

One man's martyr is another man's malignant nuclear missile designer

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'[Remember that name, Fakhrizadeh](#)', said Israeli Prime Minister Benjamin Netanyahu in 2018. On 27 November 2020, the world remembered. Mohsen Fakhrizadeh, a man who Israel and the United States have long suspected to be the [leading figure in an ostensibly secret Iranian nuclear weapons project](#), was killed while travelling with his car near Tehran. Apparently, he was a [victim of remotely activated machine gun fire and explosives](#). In a [letter addressed to the United Nations](#), Iran's Ambassador to the UN spoke of 'serious indications of Israeli responsibility'. While the responsibility for the attack is indeed still unclear, this post examines the incident on the premise that a State (other than Iran) is responsible for the death of Mr. Fakhrizadeh through the lens of human rights law and the *jus ad bellum*. In line with [Agnes Callamard's view](#) that the killing took place outside an armed conflict, international humanitarian law will not be applied to the case at hand.

The assassination of Mohsen Fakhrizadeh under international human rights law

Like any human being, Mr. Fakhrizadeh enjoyed the right to life. The killing of a person by a State may constitute an arbitrary deprivation of life and violate Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR). Assuming another State was responsible for Mr. Fakhrizadeh's death, the question of the ICCPR's application *ratione loci* arises. Article 2(1) ICCPR stipulates that a party must respect and ensure the Covenant's rights to 'all individuals within its territory and subject to its jurisdiction'. Mr. Fakhrizadeh was assassinated in Iran and not within the territory of another State. But did any other State exercise jurisdiction over him at the time of the attack?

The notion of 'jurisdiction' in the case of Mr. Fakhrizadeh

'Jurisdiction' often parallels territory, but the term is not necessarily limited in this regard. The ICCPR is generally applicable to extraterritorial situations. (cf. [Wall Advisory Opinion](#), para. 109) A person is subject to a State's jurisdiction if that State exercises power or effective control over the person's enjoyment of the right to life (cf. [General Comment 36](#), para. 63). The European Court of Human Rights (ECtHR) handles the notion of 'jurisdiction' restrictively. For example, applying the notoriously narrow reading of [Banković](#), the killing of Mr. Fakhrizadeh with remote machine gun fire and explosives would not establish a jurisdictional link. However, as the British High Court of Justice convincingly put it when dealing with the scope of jurisdiction under the European Convention of Human Rights: '[Using force to kill is indeed the ultimate exercise of physical control over another human being](#)' (a legal position [endorsed](#) by the Special Rapporteur on extrajudicial, summary or arbitrary executions). In a more recent [judgment](#) dealing with the killing of an individual by

State actors, the Grand Chamber of the ECtHR did not need to tackle its much criticized Banković decision or expand the [Al-Skeini](#) understanding of the exceptional character of the extraterritorial exercise of 'jurisdiction' by deciding whether the firing of bullets and kinetic effects alone might suffice to establish jurisdiction.

A broader understanding of the 'power or effective control' dogma

The Human Rights Committee's (HRC) [2018 General Comment on the right to life](#) hints towards another possible way to apply the ICCPR to the case at hand, broadening but not abandoning its 'power or effective control' approach to jurisdiction. It referred to a reasonably foreseeable 'impact' of a State's activities on the right to life of a person. This should be seen in the light of the negative dimension of Article 6(1) ICCPR, *i.e.* a State's duty to respect life. The incident evidently had a grave and foreseeable impact on the life of Mr. Fakhrizadeh. Against the notion of a foreseeable and direct impact of a State's action, 'jurisdiction' of another State would be established, rendering the ICCPR applicable *ratione loci*. While this interpretation is rooted in a progressive reading of the HRC's General Comments, it should be noted that the Committee's understanding of 'power or effective control' over an individual is [broader](#) than the way the ECtHR regards jurisdiction by virtue of State agents [exercising 'control'](#) and authority' over an individual.

Mr. Fakhrizadeh's killing as a violation of Article 6(1) ICCPR?

A deprivation of life violates Article 6(1) ICCPR if it is arbitrary. For example, the arbitrariness of the act would be excluded if the killing of Mr. Fakhrizadeh served as a strictly necessary protective act against an imminent threat to life. Even on the premises that a) the Iranian program to develop a nuclear missile warhead existed and that b) Mr. Fakhrizadeh was the head of the program, it is not indicated that the completion of the weapon was close. Thus, even if Mr. Fakhrizadeh's activities were malignant, it is unlikely that they posed an imminent threat to someone's life that would justify the use of lethal force. Due to the absence of evidence and considering the high standards for a non-arbitrary killing, his assassination probably was an arbitrary deprivation of life.

Use of force, self-defense and self-defense against the use of force

The assassination of Mr. Fakhrizadeh also poses questions under the *jus ad bellum*. He was killed with gunfire and explosives – weapons in the most classical understanding of the term 'force'. However, some argue that '[very small incidents lie below](#)' the threshold of Art. 2(4) of the Charter of the United Nations (UNCh), highlighting '[for instance the targeted killings of single individuals](#)'. Even following this view that micro invasive acts of 'armed force' do not meet an alleged gravity threshold of Article 2(4) UNCh altogether, the killing of Mr. Fakhrizadeh was not a small scale act. This is due to the UNCh's aim to comprehensively ban the use of arms as a means of inter-State policy. Mr. Fakhrizadeh, an eminent scientist of the Iranian Government, was killed in what appears to have been a meticulously planned attack – especially given that he was one of the best protected Iranians. Most likely, the perpetrators (in this scenario agents willfully sent by a third State) did not target Mr. Fakhrizadeh in his private capacity but intended to deliberately target

Iran itself. The attack aimed to profoundly and coercively (by virtue of 'armed force') influence Iran's (scientific) policy for years to come. This differentiates this case from the [targeted killings of terrorists or non-State actors](#), which are often not primarily aimed at substantially damaging other States. In conclusion, if Article 2(4) UNCh contains a certain gravity threshold, due to the deliberate nature of the use of force it would be met.

Self-defense against a nuclear weapon?

Pursuant to Article 51 UNCh, a State may resort to the use of force in self-defense against an 'armed attack'. In light of the [Webster Formula](#), a State may resort to force in an exercise of preventive self-defense against an armed attack that has not yet occurred but which is imminent, i.e. if there is 'a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation'. Whatever the exact status of an Iranian nuclear missile program, the killing of its alleged head took place at a time when the prospect of a nuclear weapon, let alone Iran's specific intention to attack was still more than diffuse. In fact, even if Iran were already in possession of a bomb, this alone would not trigger the right to self-defense by virtue of an imminent armed attack. ([O'Connell/EI Molla](#), 315, 319) Any legal figures such as the [infamous preemptive self-defense doctrine](#), which aim to extend the right to self-defense beyond an 'imminent' attack, should be dismissed. Not only have most States – rightly – rejected this approach, but this understanding also contravenes the object and purpose of the UNCh and its Article 39. Self-defense before an 'armed attack' should only be possible in narrow circumstances, i.e. if the threat of another State's attack is pressingly feasible. Thus, States were unable to invoke self-defense.

Would a reaction of Iran be covered by the right to self-defense?

Iran's President Rouhani [announced](#) that Iran would respond to the killing. His statement possibly hints at the use of force by Iran. It is questionable whether such an act would be covered by Iran's right to self-defense. First, while, Iran's Ambassador to the UN spoke of 'serious indications of Israeli responsibility', 'indications' hardly live up to the burden of proof for the party invoking a right to self-defense. (cf. [Oil Platforms](#), paras. 50-64). Second, the assassination must have been of a certain scale and effects (cf. [Nicaragua, Merits](#), paras. 191, 195) to meet the threshold of an 'armed attack'. Arguably, the killing of a single person does not constitute a grave form of the use of force, comparable to those enumerated in the [Definition of Aggression](#), which in turn provides indications as to the threshold of an 'armed attack'. Thus, Iran may only respond with non-forcible countermeasures. On a side note: In his separate opinion in the Oil Platforms Case, [Judge Simma](#) prominently argued for a possible 'defensive military action "short of" full-scale self-defense' in instances of an unlawful use of force 'short of' an armed attack. Regardless whether this reflects *lex lata*, the [ICJ](#) held that self-defense warrants only necessary measures. For example, an [Iranian strike](#) in kind would be purely retaliatory in nature. It would neither be an answer to an 'imminent' armed attack nor would such be necessary to respond to an (alleged) armed attack.

Conclusion

It remains a thought game whether Mr. Fakhrizadeh's assassination violated international law. The factual uncertainty makes it impossible to give a definite answer. But if Israel – or any other State – was indeed responsible for his death, there are strong arguments to see this as a violation of human rights law and the *jus ad bellum*. In any event, Iran will [uphold](#) its [nuclear energy ambitions](#) and the scenario of an atomic bomb in the hands of the Islamic Republic continues to hang over the region like a Sword of Damocles. For now, the alleged Iranian mastermind behind the State's nuclear weapons ambitions is dead, leaving us with a lot of questions as to the (il)legality of his death under international law.

